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SUPREME COURT, U.S.

No. 98-273

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the Supreme Court of Pennsylvania, No. 39 M.D. Appeal Docket 1998

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the findings of the Pennsylvania Supreme Court affirming the Pennsylvania Commonwealth Court were correct that (a) the requirements of Pennsylvania's election law under 25 Pa.C.S.A. §2872.1(3) are constitutional, and that (b) the statute serves the legitimate purposes of avoidance of ballot clutter and the requirement that candidates for the nonfederal, statewide elective office of Governor must demonstrate more than local support for the office sought?

2. Whether the provision of Pennsylvania's election law at 25 Pa.C.S.A. §2872.1(3) imposes a "minimal amount of inequality" consistent with the United States Supreme Court's constitutional test of requiring election law restrictions to be at least reasonable and nondiscriminatory?

3. Whether the Commonwealth of Pennsylvania has remained within its scope of State Sovereignty in making ballot regulations for candidates who seek nonfederal, statewide elective office?

Suggested answer to all of the above: Yes.

PARTIES TO THE PROCEEDING

Petitioner: Philip Berg, Resident of Pennsylvania

Respondents: Louis B. Kozloff, Resident of Pennsylvania
D. Michael Fisher, Attorney General for the Commonwealth of Pennsylvania

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OPINIONS AND ORDERS BELOW

The unreported Opinion of the Pennsylvania Supreme Court, dated May 15, 1998 which was filed in support of the per curiam order of the Court dated May 11, 1998, affirmed the decision of the Commonwealth Court of Pennsylvania in striking Phil Berg's name from the May, 1998 Pennsylvania primary election ballot. Both Orders are reproduced in Appendix A of Petitioner's Petition for Writ of Certiorari before this Court.

STATEMENT OF JURISDICTION AND TIME FACTORS

The judgement of the Supreme Court of Pennsylvania was entered on May 11, 1998.

Petitioner properly invokes the appellate jurisdiction of this Court under 28 U.S.C. §1254(1) "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree" and

timely filed his appeal on August 12, 1998, within the 90 days allowed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions at issue in this case include: the First Amendment to the U.S. Constitution providing, in part:

> Congress shall make no law ... abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

the Tenth Amendment to the U.S. Constitution providing:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

and the Fourteenth Amendments to the U.S. Constitution providing, in part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws."

The statutory provision at issue in this case is the petition signature requirement for a candidate (in a mainstream, not a third party) seeking to run for the nonfederal, statewide elective office of governor of Pennsylvania providing, in part:

> Candidates for nomination of officers listed below shall present a nominating petition containing at least as many valid signatures registered and enrolled members of the property as listed below:
>
> * * *
>
> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 Pa.C.S.A. §2872.1 (Act of June 3, 1937, P.L. 1333).

STATEMENT OF THE CASE

On March 10, 1998, following the time period for obtaining signatures for nomination petitions required to be placed on the Pennsylvania primary election ballot, Petitioner Berg filed with the Secretary of the Commonwealth a nomination petition as a prospective Democratic candidate for the office of Governor of Pennsylvania. His petition included

signatures from 10 counties, including 128 purported signatures from Dauphin County.

On March 17, 1998, Respondent Kozloff filed with the Pennsylvania Commonwealth Court a Petition to Set Aside the Nomination Petition of Phil Berg, challenging 54 of the purported signatures from the 128 listed on Berg's nomination petition from Dauphin County.

On March 25, 1998, before the evidentiary hearing in Commonwealth Court, Petitioner Berg filed an action in the United States District Court for the Eastern District of Pennsylvania, asking for (a) a declaratory judgement from that court that (a) the signature requirement of the election statute was unconstitutional, and (b) for injunctive relief preventing the Department of State from withholding petitioner's name from the ballot.

On March 26, 1998, Petitioner Berg filed a Motion to Dismiss the Petition to Set Aside the Nomination Petition.

On March 30, 1998 at the evidentiary hearing in

Commonwealth Court, some of the purported signatures on Petitioner Berg's nomination petition were found to be invalid, and Berg conceded that he failed to meet the minimum statutory requirements to run for the office of Governor.

On April 3, 1998, at an evidentiary hearing on the matter in the U.S. District Court for the Eastern District of Pennsylvania, Judge Katz denied Petitioner Berg's motion for relief, finding as a conclusion of law that by his own concession, Berg failed to meet the minimum statutory requirements of the Pennsylvania election law to gain access to the primary ballot.

On April 7, 1998, Judge Doyle of the Pennsylvania Commonwealth Court ruled that the statute in question was, and is, constitutional, and also found that Petitioner Berg failed to meet the minimum statutory requirements to gain access to the primary ballot. Judge Doyle ordered the Secretary of the Commonwealth to strike Berg's name as a candidate in the Democratic primary election held on May 19, 1998. Petitioner

appealed to the Pennsylvania Supreme Court.

Petitioner Berg also appealed his federal case to the United States District Court for the Third Circuit. Chief Judge Becker, after presiding over a hearing on the matter, dismissed the appeal on the grounds that the case was being considered on the merits in the Pennsylvania Supreme Court concurrently with Berg's identical appeal in the federal courts.

On May 11, 1998, the Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court below, upholding the constitutionality of the statute.

On May 12, 1998 petitioner Berg made application to Justice Souter of the United States Supreme Court for an Emergency Order to stay the Orders of the Pennsylvania Supreme Court and Pennsylvania Commonwealth Court striking his (Berg's) name form the primary ballot. On May 15, 1998, Justice Souter denied the application.

Petitioner Berg timely filed the instant appeal with this Court on August 12, 1998, within the 90 days allowed

following the decision of the Pennsylvania Supreme Court which upheld the constitutionality of the state election statute.

ARGUMENT – REASONS FOR DENYING WRIT

1. The provisions of the Pennsylvania election law which govern the collection of signatures on the nomination petition for the office of governor are constitutional.

A. The provisions of the Pennsylvania Election Code are Constitutional.

In assessing the constitutionality of the statute in question, the Court must consider:

> ...the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for theburden imposedd by its rule. In passing judgement, the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3d. Cir. 1997).

The Commonwealth Court of Pennsylvania below used this methodology to test the validity of appellant's challenge to the constitutionality of the Pennsylvania election law 25 Pa.C.S.A. §2872.1(3). The Court first determined whether to apply a strict scrutiny analysis or a rational basis analysis to the statute. Noting that "...if a law does not significantly affect a fundamental right or involve a suspect class, it is subject to a rational basis of review by the Court." Cavanaugh v. Schaeffer, 444 A.2d 1308 (Pa.Cmwlth. 1982.) Under this standard, it is the plaintiff who bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest. Hahn v. United States, 757 F.2d 581 (3d. Cir. 1985).

The Court below found that the case at bar does not implicate the one person-one vote principle, and therefore "no fundamental rights are affected by the 10-county requirement" of the Pennsylvania election law. (See Judge Doyle's opinion, p. 7.) Previously, the Commonwealth Court, has stated:

> The one person-one vote principle . . . was designed to remedy the unequal representation rights of voters. "The first principle inherent in our republican form of government is that individual citizens submit to rile by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among several districts within the political unity, then the voting strength of the individual citizens in these subdivisions is of unequal weight."

Cavanaugh v. Schaeffer, 444 A.2d 1308 at 1312 (quoting Buchanan v. Rhodes, 249 F.Supp. 860 (N.D. Ohio 1960), appeal dismissed 385 U.S. 3 (1966)). This case is distinguished this case from the case at bar in that the appellant is seeking his party's nomination for the executive office Governor, not a legislative office. Thus the representational issue at the center of the one man-one vote principle is not present here, and the principle should not apply. Because the principle is not at issue in the case at bar, the strict scrutiny standard of review of the Pennsylvania election law provision at question should be evaluated under the rational basis test (below).

Likewise, Courts have noted that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." Burdick v. Takushi 504 U.S. 428 (1992), citing: Bullock v. Carter, 405 US 134, 133, 31 L.Ed.2d 92, 92 S.Ct. 849 (1972); Andersen v. Celebrezze, 460 U.S. 780, at 788, 75 L.Ed.2d 547, 103 S.Ct. 1564 (1983), Donald v. Board of Election Comm'rs of Chicago, 394 US 802, 22 L.Ed.2d 739, 89 S.Ct. 1404 (1969).

Appellant's argument that this case is similar to the precedent set 29 years ago in Moore v. Ogilvie (394 U.S. 814) is not correct. In Moore, the Court examined a constitutional challenge to an Illinois law requiring 25,000 signatures statewide, including 200 signatures from 50 of the state's 102

counties (or 49% of the counties) as a prerequisite to being placed on the primary ballot for the office of President of the United States. Moore has been used as support for striking down several provisions of other states' election codes, including an Ohio election statute requiring independent candidates to have 200 signatures from at least 30 of the state's 80 counties (or 37.5% of the counties), and a New York election law that required at least 50 signatures from each county (or 100% of the counties) in the state. See Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (S.D. Ohio, 1970), appeal dismissed, 409 U.S. 942 (1972) and Socialist Workers Party v. Rockerfeller, 314 F.Supp. 984 (S.D.N.Y.) aff'd., 400 U.S. 806 (1970).

The case at bar is distinguishable from Moore and those which followed Moore, in that the percentage of counties from which signatures were required was far greater than that imposed by the Pennsylvania election code. The Pennsylvania statute, 25 Pa.C.S.A. §2872.1(3), provides that a candidate for

the office of Governor must collect two thousand signatures, including one hundred from each of at least ten counties, or from only 14.9% of the counties in the Commonwealth. Thus, there is not, as in the New York and Illinois cases, an apparent "veto" power granted to a minority of the population to frustrate the apparent will of the majority as evidenced by a candidate's apparent support in populous counties. (In Pennsylvania, if a candidate collected 100 signatures from only 9 of the top 10 populated counties, and could not obtain 100 signatures from any one of the remaining 58 counties, it would take approximately 42% of the state's Democratic electors remaining, all refusing to sign the candidate's petition, to defeat the candidate's bid for nomination.)

Under the rational basis test, the Commonwealth has legitimate, articulable interests for legislating the signature requirements found in 25 Pa.C.S.A. §2872.1(3). This provision enables the state to ensure that the ballot will not be cluttered with candidates having only small, local support.

Likewise, the provision requiring at least one hundred signatures from each of at least ten counties is designed to ensure that candidates do not merely obtain signatures from the most populated counties of the Commonwealth (i.e. Philadelphia, Allegheny, Montgomery, Delaware, and Bucks). Any successful candidate for Governor is required to collect signatures from registered voters in at least five of the remaining 62 counties (or slightly more than 8% of the remaining counties).

B. The Provisions of the Pennsylvania Election Code provide for a "Minimal Amount of Inequality" Consistent with the U.S. Supreme Court's Requirements that Such Regulation be "Reasonable and Nondescriminatory."

In his Opinion below, Judge Doyle noted that "...while it is clear that [the election code provision] does result in a minimal amount of inequality throughout the Commonwealth, this minimal inequality is insufficient to support a finding that the statute fails the rational basis test." (See Opinion of Judge Doyle, page 10.) This rationale comes from an analysis of the

Fourteenth Amendment in which the United States Supreme Court has long held:

> The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, at 78, 55 L.Ed 369, at 377, 31 S.Ct. 337 (1911), followed by the United States Court of Appeals for the Third Circuit most recently in Donatelli v. Mitchell, 2 F.3d 508 (3d. Cir. 1993). In this case, Judge Doyle has ruled that the "inequality" with which the candidate is burdened is "minimal." The burden that 25 Pa.C.S.A. §2872.1(3) places on the appellant was minimal. Thus, the case at bar fits within the requirements that the United States Supreme Court has set, stating that regulatory

statutes are permissible if they impose "reasonable nondiscriminatory restrictions" on voters rights for the purpose of satisfying important governmental interests. Burdick v. Takushi 504 U.S. 428 119 L.Ed.2d 245, 112 S.Ct. 2059 (1992). The Burdick Court said:

> "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure. [Citations omitted.] It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. [Citations omitted.] ...Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' Storer v. Brown, 415 U.S., 724, 730, 39 L.Ed.2d 714, 94 S.Ct. 1274 (1974)."

Burdick, 504 U.S. 428, at 433.

The United States Supreme Court has also recognized that to achieve a proper objectives:

> "...States have enacted comprehensive and sometimes complex election codes. Each

> provision of these schemes, whether it governs the registration and qualification of voters, *the selection and eligibility of candidates*, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." (Emphasis added.)

Andersen v. Celebrezze, 460 U.S. 780, 75 L.Ed.2d 547, at 557, 103 S.Ct. 1564 (1983). And, again in Andersen, the Court noted in passing that "It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable. Id., 460 U.S. 780, at 788 (see footnote #10).

25 Pa.C.S.A. §2782.1(3) embodies the very principle outlined by the Andersen Court, and imposes a minimal burden on the potential candidate to meet an important state interest, calling for a candidate for statewide office to demonstrate more than mere local support for the office he

seeks. The statute does so within the framework of being reasonable (requiring signatures in less than 15% of the counties, notably of the candidate's choosing) and within the framework of being nondiscriminatory. The statute, therefore, meets the requirements of an election code regulation as set forth by the United States Supreme Court, allowing for the imposition of "reasonable nondiscriminatory restrictions" on voters rights for the purpose of satisfying important governmental interests. See Burdick, supra.

2. The restrictions in the Pennsylvania election code promote legitimate state interests, including the avoidance of ballot clutter, and the requirement that candidates for Governor must demonstrate something more than local support for the office they seek.

As outlined above, the provisions of the Pennsylvania election code that require a geographic distribution for signatures on nomination petitions for non-federal, statewide officeholders are designed with legitimate interests of the Commonwealth in mind.

The United States Supreme Court has also stated that

"The procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process." Lubin v. Panish 415 U.S. 709, 715 (1974). The Commonwealth Court below agreed that keeping the ballot free from chaos is a legitimate interest the Commonwealth of Pennsylvania has in the signature requirement of 25 Pa.C.S.A.§2872.1(3). See Opinion of Judge Doyle, page 8.

The United States Supreme Court has recognized that "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other in avoiding confusion, deception, and even frustration of the democratic process at the general election." Jenness v. Fortson 403 U.S. 431, 442

(1971). Again, the Court below agreed that the Commonwealth of Pennsylvania has a legitimate state interest in requiring a modicum of area wide, if not statewide support for a candidate. See Opinion of Judge Doyle, page 8.

The signature requirements found in 25 Pa.C.S.A. §2872.1(3) ensure that the ballot will not be cluttered with candidates having only small, local support. Likewise, the provision requiring at least one hundred signatures from each of at least ten counties is designed to ensure that candidates do not merely obtain signatures from the most populated counties of the Commonwealth. For these reasons, the Commonwealth can articulate clear, legitimate state interests for enacting 25 Pa.C.S.A. 2872.1(3), and the statute should be held constitutional under the rational basis test of review.

3. In the Court below, the Appellant admitted on the record that he failed to meet the requirements of the statute in order to be a candidate for Governor.

At the evidentiary hearing in the Commonwealth Court, Appellee Kozloff's challenge to the appellant's nomination

petition resulted in the admission of the appellant on record that he failed to meet the minimum statutory requirements of 25 Pa.C.S.A. §2872.1(3), by failing to collect a minimum of 100 signatures in at least 10 counties, as required by statute. Through his counsel, the appellant conceded that his petition did not contain the valid signatures of 100 Democratic electors in Dauphin County. See Opinion of Judge Doyle, page 10. On the basis of this concession, his failure to meet the minimum requirement of 25 Pa.C.S.A. §2782.1(3) was, and remains, sufficient for the Commonwealth Court to order the appellant's name struck from the ballot in the primary election scheduled for May 19, 1998.

4. The Commonwealth of Pennsylvania remains within its scope of State Sovereignty in making ballot regulations for nonfederal candidates for statewide office.

The United States Supreme Court has noted that while the Equal Protection Clause provides a check on state authority, "[the Court's] scrutiny will not be so demanding where we deal

with matter resting firmly within a State's constitutional privileges." Gregory v. Ashcroft, 501 U.S. 452, at 462 (1991) (quoting Sugarman v. Dougall, 413 U.S. 643, at 648 (1973)). Thus, the United States Supreme Court has recognized that states are constitutionally responsible for the establishment and operation of their own governments respectively. Respondent respectfully submits that this includes making regulations governing the qualifications of candidates for nonfederal, statewide elective office. The Respondent also respectfully contends that the sovereignty and independence of the Commonwealth of Pennsylvania as a viable actor in the constitutional system should be carefully weighed in the case at bar. The preservation of state sovereignty in this instances is not inconsistent with the requirements of the United States Constitution, as demonstrated above.

In the case of Clemens v. Fashing, 457 U.S. 957 (1982), the United States Supreme Court upheld provisions of the Texas Constitution which restricted a public official's ability to

run for another public office. In his concurring opinion, Justice Stevens defined the issue presented in the case as "whether there is any federal interest in requiring a State to define the benefit and burdens of different elective state offices in any particular manner." Id, at 973 (1982). He concluded that there was "no federal interest" in the state's self- regulation of the election of state officers, and therefore did not require the state to assert any interest at all to survive equal protection scrutiny. Id, at 976. Justice Stevens has also noted that "The Equal Protection Clause certainly was not intended to require the States to justify every decision concerning the terms and conditions of state employment according to some federal standard." Id, at 975. The Respondent respectfully contends that the interest of the Commonwealth of Pennsylvania as a sovereign body should be carefully weighed when determining the validity of its regulation of candidates for nonfederal, statewide elective office.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

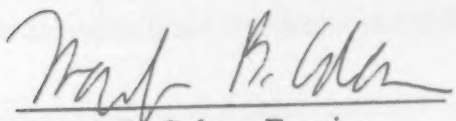
The Pennsylvania Supreme Court has correctly held that 25 Pa.C.S.A. §2872.1(3) of Pennsylvania's election statute is constitutional. The statute serves legitimate purposes of (1) the avoidance of ballot clutter and (2) requiring that candidates for the nonfederal, statewide office of Governor must demonstrate more than local support for the office they seek.

The statute imposes a burden of only a minimal amount of inequality," and that this minimal burden is consistent with the United States Supreme Court's constitutional test of requiring election law restrictions to be at least reasonable and nondiscriminatory.

The Commonwealth of Pennsylvania has remained squarely within its scope of State Sovereignty in making ballot regulations for candidates who seek nonfederal, statewide elective office.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,



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In The
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OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

I, Mark B. Cohen, Esquire, hereby certify that copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter were forwarded to the following persons, by First Class Mail postage prepaid, by depositing the same in a United States Post Office or mailbox this 8th day of September, 1998, that said service is in accordance with Rule 28 of the Rules of the United States Supreme Court, and that the persons listed constitute all parties required to be served:

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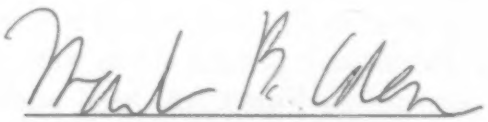

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